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ABSTRACT

Although juveniles are not considered criminals, it has been only in the last decade that they have been accorded the constitutional rights to fairness and due process of law accorded to adults - - basic rights guaranteed by the United States Supreme Court decision in the Miranda case. However, since a large proportion of youthful arrestees are of low socioeconomic status, intellectual deficiency, poor home background, and low educational attainment, there is great concern as to whether these youth completely understand both what their legal rights are and what it means to waive them. References are made to many legal decisions, and suggestions are provided for re-evaluation of the process by which juvenile confessions are obtained. They include: (1) revision of the wording in the Miranda statement; (2) establishment of stricter criteria for considering a waiver valid; and (3) greater involvement of parents and/or lawyers before questioning occurs. (Author/HLM)

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Saundra Brewer

March 1978

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THE YOUNGEST MINORITY: ARE THEY COMPETENT TO WAIVE THEIR CONSTITUTIONAL RIGHTS?

by
Saundra Brewer

The basic principle underlying contemporary juvenile law is the concept of guidance and rehabilitation of a minor instead of guilt and punishment. The state has assumed the role of *parens patriae*, therefore, whereby its supervision of a child who is under a legal disability is analogous to that of a parent. The anomaly produced by the *parens patriae* stance, however, is that a minor may receive less protection because of his age than he would have received if he were an adult.[1]

> It should be recognized, however, that the balance of power existing between minors, their parents and the state is not a static system of well-defined rights and corresponding duties but a constantly shifting pattern of rights and duties determined to a large extent by the changing social climate. As the family institution undergoes change, so do the relationships existing between children, parents and government.[2]

Since juveniles are not considered criminals, they have only in the last decade or so been accorded the constitutional rights to fairness and due process of law accorded to adults, the rationale being that the juvenile legal process constitutes a civil rather than a criminal proceeding. "Recognizing that kids in trouble with the law are not the same as adult criminals, juvenile courts have tried to establish a more flexible set of standards and procedures than are used in adult criminal courts."[3] And, because of the varied interpretations of juvenile law resulting from the transition from concern with needs (*parens patriae*) toward concern for the juvenile's rights, this area of the law is in a great state of flux.

The United States Supreme Court long has recognized the requirement that an accused be treated fairly, or extended due process, in a criminal proceeding. Because of the many different interpretations that were reflected in court decisions, however, the Court, in *Miranda v. Arizona*,[4] sought to delineate the requirements of the fifth and sixth amendments[5] which were to be accorded an accused person. In *Miranda*, law enforcement officials had taken a kidnapping and rape suspect into custody and interrogated him with the intent of eliciting a confession. The police did not effectively advise the defendant of his fifth and sixth amendment rights at the outset of the interrogation process and denied his request to speak with his attorney. The defendant was interrogated while standing handcuffed for four hours in a special interrogation room in the police station, after which he confessed. The Court held that all statements made by the defendant under these conditions were constitutionally inadmissible and, accordingly, reversed the conviction of

the Arizona Supreme Court. *Miranda* thus increased the severity and specificity of earlier Court decisions.[6]

Miranda used the term "custodial interrogation" to denote the two conditions, custody and interrogation, that would jeopardize an accused's privilege against self-incrimination.[7] In order to safeguard the privilege, *Miranda* delineated a system of required warnings to be employed whenever a suspect might be subjected to custodial interrogation.[8]

One year later, the United States Supreme Court in *In re Gault*[9] concluded that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults."[10] In *Gault*, the Court accorded to juveniles who "are in danger of loss of liberty because of commitment . . ., on due process grounds, the right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine opposing witnesses under oath,"[11] at least at the adjudicatory stage of juvenile delinquency proceedings. In addition, written notice of the specific charge or factual allegations was to be given to the child and his parents sufficiently in advance of the hearing to permit preparation. The Court stated the due process requirement as follows:

> We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that *the hearing must measure up to the essentials of due process and fair treatment.* We reiterate this view, here in connection with a juvenile court adjudication of "delinquency," as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.[12]

Thus, the Court endeavored to achieve a "balancing of societal interests in protecting the rights of individuals while still preserving basic elements of a unique system of juvenile justice."[13]

Following *Gault*, a great volume of litigation was generated in the lower courts, revolving around the interpretation of the due process requirement. Although the issue of *Miranda* warnings was not addressed in *Gault* because no confession was made prior to the hearing, the opinion does state that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."[14] Cases have generally held, therefore, that *Miranda* "[is] applicable to custodial interrogation of juveniles in the pre-judicial state, despite the Court's reservation of the question."[15]

The Court in *Gault* expressed

> formidable doubt [about] the reliability and trustworthiness of "confessions" by children.
>
> . . . .
>
> . . . If counsel was not present for some permissible reason

> when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.[16]

People v. Lara[17] was decided by the California Supreme Court four months after *Gault*, and, though not a delinquency case, involved minors seventeen and eighteen years of age in a criminal proceeding. *Lara* articulated a general rule regarding the issue of voluntariness of juvenile confessions.

> This, then, is the general rule: a minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, and ability to comprehend the meaning and effect of his statement.[18]

Lara went on to say that a minor's previous experience with the criminal justice system would be a contributing factor to consider in the totality of circumstances.

> Among the circumstances emphasized by the courts as tending to show that the minor possessed the capacity required to make a voluntary confession are his prior experience with the police and courts . . . and the fact that advice as to his legal rights was given to him before he confessed. . . . On the other hand, if the minor is mentally retarded or of subnormal intelligence for his age . . ., that is a factor weighing heavily against a finding of capacity. Yet even the presence of such mental subnormality does not require the automatic exclusion of the minor's confession, and the "totality of circumstances" test still applies.[19]

Certainly the thorniest issue in applying a minor's constitutional rights is this question: Does a minor possess the requisite capacity to waive the exercise of those rights?

> Children present an especially difficult problem of capacity because children are by reason of age, intelligence and lack of experience more likely to be overreached in a coercive atmosphere. In spite of these considerations, the overwhelming weight of authority supports the proposition that a child may effectively waive constitutional rights, such as those recognized in *Miranda*.[20]

The Court in *Gault* recognized that special problems might arise in determining whether a child could waive his constitutional protections.[21]

The concept of waiver of one's rights has long been recognized by the courts.[22] No evidence obtained as a result of a custodial interrogation may be used against an accused unless and until the prosecutor demonstrates a valid waiver of constitutional rights. *Johnson v. Zerbst*[23] held that for a waiver to be effective there had to be an intentional relinquishment or abandonment of a known right or privilege.[24] Thus, whether an accused has effectively waived his right to counsel or privilege against self-incrimination depends

largely upon the facts and circumstances of the particular case.[25] Among the probative factors to be considered are the age and intelligence of the accused, his conduct and the conduct of the police at the time of the waiver and whether the accused has been given and understands his constitutional protections.

Miranda mandates that a "voluntary, knowing and intelligent waiver is a prerequisite to admissibility."[26] Thus, in order to waive a constitutional right, an individual must have both knowledge of the existence of the right and the intention to abandon it, as "an effective waiver assumes lack of ignorance, intimidation and fear."[27] A defense often raised in juvenile confession cases is that a minor is not competent to waive his constitutional privilege against self-incrimination. The rationale behind this proposition is that a minor is "generally regarded as unable to enter legal transactions and [is] presumed to lack the requisite intelligence to make a valid waiver."[28] In many civil matters, a minor is considered legally incompetent. He cannot vote, cannot enter into a binding contract, cannot make valid wills and cannot marry without parental consent. It could reasonably follow that, "based on a child's simple inability to understand the ramifications of his acts,"[29] a minor would also be legally incapable to execute a valid waiver of his constitutional rights. Courts have not so held.[30] Courts have consistently failed to accord any more significance to an individual's age than to any other circumstance of the case. "Although minority itself would not prevent an intelligent waiver . . . it is an important circumstance to be observed in the consideration of the other factors of the case."[31] Thus, waiver by a juvenile of his constitutional protections is a question of fact, not of law. "We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique--but not in principle--depending upon the age of the child and the presence and competence of parents."[32] The *Gault* Court did warn, however, that careful scrutiny of the circumstances surrounding a minor's waiver of right must be undergone for the protection of the minor.[33]

In *Lara*,[34] the California Supreme Court concluded that the defendants had voluntarily and intelligently waived their constitutional rights and therefore affirmed their convictions for murder and robbery. The court applied the "totality of circumstances" test and noted that the defendants had been fully and repeatedly advised of their constitutional rights prior to making their confessions and that they were familiar with the warnings, having been arrested before. One defendant was found to be mildly mentally retarded, and both came from a Spanish speaking family. *Lara* relied upon an earlier California Supreme Court case, *People v. Dorado*,[35] to support its holding.

Dorado had also been cited by *Miranda* to support the proposition that

"[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by out holding today."[36] This statement is significant in that spontaneous statements, or utterances not made as a result of official interrogation, are more likely to occur in the case of juveniles. In attempting to address the *Dorado* problem in the juvenile court system and also deal with the waiver issue by statutory enactment, the Committee on Criminal Law and Procedure of the California Bar in 1966 proposed that "no statement taken from a juvenile under eighteen . . . be utilized in any subsequent criminal proceeding unless made in the presence of his attorney."[37] The "Catch 22" here is that no provision was made for the minor who has waived his right to counsel! Since it can be assumed that the rationale employed in drafting the proposal was that minors are incompetent to waive their constitutional rights, then it would be incongruous for the benefits of the measure to be denied those most needing its protection. At present, California requires that notice of a minor's constitutional rights be given both to the minor *and* to his parents during at least one of three stages in a juvenile proceeding: when the minor is brought before the probation officer,[38] at the detention hearing,[39] and at the adjudication hearing.[40] The minor's rights cannot be waived solely by the minor at these times; his parents must have been consulted and concur in the decision to waive.

Following on the heels of *Lara*, and adhering to its dictates regarding a minor's capacity to waive his right was *In re Dennis M.*[41] The California Supreme Court, in affirming the minor's Youth Authority commitment, stated that a minor did not lack the capacity to waive constitutional rights as a matter of law, *i.e.*, simply because he is a child. "As *Lara* makes clear, chronological age alone is not determinative of the question of capacity: 'The issue, as with all matters of waiver, is to be resolved upon the whole record.'"[42] Justice Peters dissented from the majority opinion, as he had done in *Lara*. In *Dennis M.* he felt the court had even exceeded *Lara's* guidelines for determining a valid waiver.

> Here the record shows the police read to the minor the *Miranda* warnings from a card. To hold that after the mere reading and parroting of the *Miranda* rights a confession constitutes a knowing waiver of constitutional rights without the advice of a parent, adult or lawyer is to simply disregard the limitations on the waiver rule announced in *Lara* so far as minors are concerned.[43]

State in Interest of S.H.,[44] while not a California case, is nevertheless significant in any discussion of waiver because in it the New Jersey Supreme Court expressly stated that police interrogation may continue even though a child is incapable of asserting his right to remain silent! In this case the minor, who confessed to homicide, was ten years old with an I.Q. in the mildly defective range of intelligence. The court found that the child could

not have knowingly and intelligently waived his *Miranda* rights since he could not understand them. Astonishingly, the court appended the following: "However, questioning may go forward even if it is obvious the boy does not understand his rights if the questioning is conducted with the utmost fairness and in accordance with the highest standards of due process and fundamental fairness."[45]

The 1975 case of *In re Roger G.*[46] is noteworthy because in it the California court of appeal ruled a minor's confession involuntary and hence inadmissible when it was found to have been procured by an implied, if not express, threat of harsher punishment if the minor did not confess, and an implied, if not express, promise of leniency if he did.[47] The fact that the minor had been given a clear *Miranda* advisement at the outset of the interrogation was summarily dismissed in the court's ruling: "We thus conclude that uncontradicted evidence in the record established that Roger's confession was involuntary. That conclusion compels reversal of the adjudication of the juvenile court, irrespective of the weight of other evidence of guilt."[48]

In the spirit of *Roger G.*, the California court of appeal in *In re Garth D.*[49] ruled that admissions which are the product of improper coercive influence exerted upon a minor by juvenile hall staff members and a police officer should be excluded as involuntary. The court stated that the determination of "voluntariness"

> must be made in light of the whole record and must take into account all of the circumstances surrounding the admissions. . . .
>
> Significant factors bearing upon the voluntariness of appellant's admissions in the case at bench include his age, the amount of physical abuse and psychological pressure to which he was subjected, denial of his right to counsel during police interrogation, his insulation from family contacts, and the fact that the admissions were made to a probation officer.
>
> . . . .
>
> While no single one of the foregoing circumstances in isolation may have rendered the admissions to the probation officer involuntary, their cumulative effect compels the conclusion that the statements were the direct product of the coercive and illegal conduct of the police, probation officers and counselors. The fact that appellant is a minor demands emphasis. A sixteen-year-old cannot be judged by the exacting standards of maturity.[50]

Within the last six months three cases have been handed down by the California court of appeal which may indicate California's present stance on the issue of juvenile waiver. In *In re Reginald B.*,[51] the court rejected the minor's contention that because he had "initially denied killing anyone his subsequent willingness to confess demonstrated a confused state of mind inconsistent with the 'rational intellect and a free will' necessary to a voluntary confession"[52] despite the fact that he had signed a *Miranda*

waiver. The court also relied on *Lara* to support the proposition that a minor's constitutional rights can be effectively waived.[53]

In *In re James M.*,[54] the court reversed the juvenile court's order of wardship, holding that since the deputy sheriffs would have been entitled to arrest the minor, "[t]he minor was effectively under arrest for possession of a dangerous weapon and should have been given his *Miranda* warnings before any questions concerning that possession were asked,"[55] and thus "his statement that the nun-chakus sticks belonged to him was inadmissible because obtained in violation of his *Miranda* rights."[56]

While the *James M.* decision does not so state, its holding is clearly supported by Section 625 of the Welfare and Institutions Code.[57] Before the California statutes relating to youthful offenders were amended in 1971 and 1976,

> the police, in the absence of reasonable grounds to believe that [a] youth had committed a criminal offense, could rely instead on the much broader "protective" jurisdiction that permit[ted] a youth to be taken into custody where he is "seriously endangered in his surroundings" or is "in danger of leading an idle, dissolute, lewd, or immoral life."[58]

California statutory law now mandates that before he detains a juvenile, a police officer must have at least reasonable cause to believe the juvenile is a person described in Section 601 or 602. Moreover, if a juvenile is detained, Section 625 expressly requires that he be advised of the constitutional rights designed for his protection.[59] The California legislature has, however, condoned competent waivers by juveniles. California Code of Civil Procedure, Section 372, reads in pertinent part: "Nothing in this section or in any other provision . . . is intended by the Legislature to prohibit a minor from exercising an intelligent and knowing waiver of his constitutional rights in any proceeding under the Juvenile Court Law."[60]

In re Robert D.[61] involved a juvenile whose incriminating statement was received in evidence by the juvenile court, resulting in his camp community placement. The minor contended that the juvenile court had prejudicially erred in receiving the statement in evidence because

> (1) the record fails to establish that Robert was warned of his *Miranda* rights prior to the statement; (2) Robert was not afforded the opportunity to consult with his parents or attorney prior to the statement and neither his parents nor attorney were present; (3) Robert did not waive his *Miranda* rights to counsel and to remain silent; (4) Robert was incapable by reason of intoxication of an intelligent waiver of *Miranda* rights; and (5) the statement was the product of coercion.[62]

The court of appeal "conclude[d] that the record support[ed] the reasonable inference that Robert's statement was spontaneous and volunteered without questioning,"[63] and thereby affirmed the order of the juvenile court.

The arresting officers had found Robert "lying face down at the northeast corner of [an] intersection."[64] Robert had to be "assisted to his feet" in order to be taken to the police car and, after being placed in the car, became "belligerent" and generally irrational.[65] Despite these clear indications of possible intoxication, the opinion of the court of appeal avoided any discussion of whether the minor had been intoxicated at the time of his incriminating admission. Intoxication is necessarily a circumstance within the totality!

Further ignored by the court was the physical and psychological coercion exhibited by the arresting officers (*e.g.*, "choke hold" and threat of an "additional charge") immediately preceding the minor's statement.[66] The court, in so excluding these circumstances in making its analysis, appears to give short shrift to the holding of *Garth D.* and, moreover, of *Gault*.

> The United States Supreme Court has cautioned that even when counsel "was not present for some permissible reason when an admission [of a juvenile] was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[67]

It appears that the court of appeal, in deciding *Robert D.*, chose the most facile route by relying on adult case law to render a juvenile's statement admissible under these conditions.[68] Whether the court was so motivated by a feeling that the civil nature of the juvenile court proceeding would only result in limited loss of freedom for the minor,[69] or by a careless disregard for the special frailties of youthful offenders, *Robert D.* today stands as California's most recent expression on the matter of juvenile confessions. If the *Robert D.* ruling is any representative indicator, its ominous implications may well serve to generate increased ambiguity in the interpretation and application of the rights to be accorded youthful suspects.

"Totality of circumstances," a test for determining the existence of a valid waiver, was first established by the United States Supreme Court in *Gallegos v. Colorado*.[70] It was stated there that

> [A child has] no way of knowing what the consequences of his confession are without advice as to his rights . . . and without aid of more mature judgment as to the steps he should take. . . . [However, there] is no guide to the decision of cases such as this, except the totality of circumstances that bear on the two factors we have mentioned. The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend--all these combine to make us conclude that the formal confession on which this conviction may have rested was obtained in violation of due process.[71]

Courts have considered several factors to be cogent in analyzing a minor's

capacity to make an intelligent and knowing waiver in light of the totality of the circumstances. Among these are age, mental age, previous police or juvenile court experience, advisement of rights physical condition (including intoxication), incommunicado interrogation, education, methods of interrogation (coercion), statute violations (whether a delay occurs before bringing the child before the juvenile court, etc.), presence of attorney or sympathetic adult, failure to notify parents, length of interrogation, predisposition (child's mental state at time of arrest confrontation), and language of the warnings (to reflect ethnicity and socioeconomic status, etc.).

Those encountering the police and the court for the first time, *e.g.*, many juveniles, need the most protection, having never been through such an ordeal before. "The [*Miranda*] Court suggests explicitly that the ignorant and the indigent should be protected, and by implication indicates concern for the inexperienced."[72] A juvenile is likely to be particularly susceptible to the intimidating surroundings of police custody. His reaction to "being caught," *i.e.*, fright and bewilderment, can render him totally irrational, and he may "say anything" in the blind hope that he will thus be extricated from the situation in which he has found himself.

> Most kids when confronted by the police, not only confess to the matter at issue, but will voluntarily involve themselves and others in offenses the officers had not even heard of. . . . [N]ot having the mature experience of us adults, . . . they usually "shoot the works," and "sing."[73]

In *Gallegos* the Court said:

> [A] fourteen-year old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police . . . and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.[74]

In discussing the sociological aspects of custodial interrogation, a University of Massachusetts sociology professor refers to

> [t]he imbalance [between the state and the accused which] is created and maintained by the "inherently coercive" atmosphere of interrogation, whether it be in the police station or in the defendant's home. . . . [T]he imbalance between the state and the defendant begins with arrest and detention, for these experiences influence the detained in ways analogous to interrogation: the negative implications of silence, the self-mortification or extreme humiliation at being arrested, the desire to "shield the self" from potentially humiliating questioning, and the emotional stress caused by the symbols of the law's authority even in persons of higher status.[75]

It would follow that if persons of higher status than the arresting officer can be acutely distressed in the above mentioned situation, then, *a fortiori*, a minor would be ill able to cope. Professor Driver concludes, "The *Miranda* warnings fail to provide safeguards against the social psychological rigors

of arrest and interrogation except to the extent that they prevent interrogation altogether."[76]

"A waiver is meaningless if given under stress, pressure, or fear; or if given as the result of promises of better treatment or other reward."[77] An officer may try to convince a juvenile that he will "only make it worse for himself" if he doesn't tell what "really happened." Or, since much of a juvenile officer's work relies on a system of informants and confessions, a devious ploy may be used to provoke confessions to prior offenses or to name others responsible, *e.g.*, "I can't prove it, but I have a boy who will testify against you."

Factors characteristic of a large proportion of youthful arrestees are low socioeconomic status, intellectual deficiency, inadequate home background and residence in an undesirable neighborhood. This is further complicated since the factors are not independent of each other but cluster together and interact to foster a potential delinquent behavior. Moreover, poor educational attainment is one of the most prominent characteristics of a juvenile delinquent.[78] Children from low income homes have been shown to have deficits in perceptual and cognitive development and in language.[79] While low intelligence does not lead a youth automatically into crime, "we would not hesitate to say that except for the subnormal, the lower a boy's intelligence, the more likely that he has been convicted of crimes."[80] Intelligence, therefore, is a significant variable to be weighed in assessing whether minors can competently execute a waiver of their rights.

Piaget has described the adolescent as one with little foresight, who does not consider all the possibilities before he begins. His understanding is limited to things which are available to immediate perception. The part played by possibility is very small; it is restricted to simple extension of actions already in progress. The adolescent does not consider possibilities on a theoretical plane.[81] When these characteristics of an adolescent are overlaid on a juvenile suspect-police interrogator framework, it can be readily seen that the juvenile's odds at successfully being the master of his destiny are slim. A juvenile offender rarely thinks through a criminal act before committing it, and when he does attempt to plan ahead, his lack of knowledge and inexperience make his effort ineffectual.[82]

A juvenile of low cognitive development often lacks the word skills necessary to understand simple concepts, let alone abstract ones.

> The paucity in vocabulary that one often encounters among the chronic multiple-generation poor does not signify simply a lack of formal education. It signifies absence of the word symbols that are essential ingredients in thinking about oneself and the world in which one lives. The inability of many people in this group to discuss abstract ideas is symptomatic

> of a severe handicap in the mastering of abstractions that is necessary for upward social mobility.[83]

Understanding one's constitutional rights involves highly abstract reasoning. A youth who is deficient intellectually lacks the concepts for understanding abstract distinctions, especially when told to him by an authoritative person whom he has reason to fear and distrust.

Studies have shown that lower socioeconomic status and minority students possess "less language"[84] and lack middle class children's "skill of choosing a best-fit [verbal] response."[85] A recent study which addressed the problem of "the lexical gap between minority and white students" found that "while black and chicano lexica differed [from each other], these differences seemed not as extensive as those between the white lexicon and either minority lexicon."[86] It can be concluded, then, that a *Miranda* advisement which fails to "represent the range of minority lexical style"[87] would work to the great detriment of a minority youth arrestee receiving it.

"The obvious source of incompetence to be expected in a minor is simple inability to comprehend. Immaturity, illiteracy and inexperience are concomitants of youth."[88] Verbiage in the warnings, such as "attorney" or "counsel," "self-incrimination," prior to," "admissible" and "rights" convey little meaning to many adults, let alone juveniles. A San Diego study[89] was made in response to a recommendation by the California Supreme Court in *Dennis M.* that "juvenile officers and police be prepared to give their compulsory *Miranda* warnings in terms that reflect the language and experience of today's juveniles."[90] The San Diego study attempted to "draft and test the efficacy of a simplified *Miranda* warning,[91] potentially more understandable to juveniles, and consistent with juvenile law requirements."[92] The purpose of the study was to measure objectively the subjective understanding, both conscious and latent, that the interviewed juveniles had of the five elements of the *Miranda* admonition.[93] Based upon a random sampling of ninety juveniles, divided equally between adjudicated delinquents and non-delinquents, half of whom were given the formal *Miranda* admonition and half the simplified warning,[94] the survey showed that ninety-six percent failed to understand the *Miranda* warnings, although they had voluntarily waived their rights.[95] While no significant increase in understanding was found with the simplified version, the right to counsel before and during any questioning was found to be consistently the least understood element by all the juveniles included in the sample.[96]

Besides comprehension of the words comprising the admonition, moreover, it is necessary for an individual to understand the practical significance of such words in the criminal context. *E.g.*, "the practical advantages of having a lawyer must be appreciated. Such an understanding is beyond the grasp of

most juvenile defendants."[97] Without this understanding, the warnings are ineffectual.

Particularly in dealing with juveniles, a police officer can adhere conscientiously to the letter of the *Miranda* warnings but not comply with the spirit of the admonition. By hedging on the warnings, changing the warnings or qualifying the warnings, the advice is also defused. An example would be, "You don't have to say anything now, of course, but you can explain how you happened to be in that area at that time." Intoning the admonition in a highly formalized, bureaucratic drone can indicate that what the officer is saying is merely a routine formality. For example, after a solemn recitation of the required warnings, the officer may abruptly shift to a friendly informal tone and ask, "Now, do you want to tell me what happened?" It is also very easy for the officer to imply by his tone or manner that the suspect should not exercise his rights. Both the number of times the warnings are given and the clarity with which they are given can significantly affect whether the admonition is competently received.

Added to the obfuscation of the language of the warnings is the element of fear which is inherent in a police custodial situation. The San Diego study interviewers expressly acknowledged the "mentally distracting atmosphere of police field interrogation," and made special provision to try to duplicate it in their interviews with juveniles.[98]

Although they are less knowledgeable and less experienced than their adult counterparts, juveniles have a *greater need* for the information provided by the warnings. "A suspect [is] deemed to need warnings if he [is] ignorant of his rights, unaware of the consequences of talking, apparently susceptible to tactics, or otherwise emotionally unable to cope with the 'compulsion inherent in custodial surroundings.'"[99] A New Haven study addressed the question of who most needed the protection afforded by *Miranda:*

> It is often suggested that *Miranda* is primarily an equal protection decision--the assumption is that first offenders, younger suspects, and minority groups were unequally protected by our legal system before the decision. We did find that those needing protection tended to be first offenders. . . . This finding indicates that a previous trip through the criminal process is an experience which seems to provide some education about rights and consequences of conviction, and seems to bolster the will. However, the "value" of this experience should not be exaggerated. . . . [O]ur interviews with jailed defendants indicated that even many of those with substantial experience remained woefully ignorant.[100]

It has been shown that a suspect's will may be overborne when he has been denied contact with the outside world.[101] In *Miranda*, in dictum, the Court frowned on such police conduct.[102] In *People v. Burton*[103] the California Supreme Court referred to *Miranda* in stating that incommunicado interrogation was at odds with an individual's privilege against compulsory self-incrimination.[104] *Burton* involved a minor convicted of murder and assault with intent to commit murder. The court reversed the judgment of the lower court, holding that

> when a minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning must, in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege. The police must cease custodial interrogation immediately upon exercise of the privilege.[105]

The court thus interpreted a child's request for his parents as comparable to an adult's request for an attorney. Juveniles have an acute need for advocates to guard and represent their interests.

> [A]uthorities in the field of justice hold the belief that no single action contains more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or his parent, is the keystone of the whole structure of guarantees that a minimal system of procedural justice requires.[106]

Haley v. Ohio[107] was one of the first cases to hold due process applicable to a juvenile's confession in criminal proceedings. In *Haley*, the United States Supreme Court reversed a fifteen-year-old's murder conviction when it found he was interrogated for five hours in the absence of counsel or a family member and after being confronted with alleged confessions of his alleged accomplices, finally signed a confession typed by the police. This confession was admitted into evidence over his objection and resulted in his conviction. The Court held that the methods employed to obtain the minor's confession violated the due process clause of the fourteenth amendment.

> [W]hen, as here, a mere child--an easy victim of the law--is before us, special care in scrutinizing the record must be used. . . . That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. . . .[W]e cannot believe that a lad of tender years is a match for the police. . . . He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.[108]

Thus, *Haley* stands as a classic case where lack of advice from a friendly adult worked to break down a minor's will.

Gallegos v. Colorado[109] followed *Haley* and employed analogous reasoning. In *Gallegos* the Court reversed a minor's conviction for assault upon

determining that the minor's confession, obtained without any contact with a lawyer or adult advisor, was violative of due process. The Court stated that "[a] lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not."[110]

"Many lower-class individuals feel that their lives are subject to a set of forces over which they have relatively little control."[111] In the San Diego study, sixty nine percent of the delinquent subjects indicated that they had neither requested not desired the services of a lawyer for their juvenile court proceedings. When asked why, the answer given most often was, "I knew I was guilty and deserved to be punished," or "I was guilty and a lawyer couldn't do anything for me."[112]

We have said previously that a juvenile is especially vulnerable to the effects of police contact. Given the generally negative influence of police encounters,[113] it is important to understand which socioeconomic, ethnic groups, etc. are the most adversely affected by such encounters. It is not surprising that "lower-class youth have more interaction with the police and, therefore, presumably, greater opportunity for negative outcomes from such encounters."[114]

> In studies of how boys are contacted by the police. . ., [t]he indicators mentioned most frequently by both policemen and gang boys are the juxtaposition of race and neighborhood plus an odd assortment of clothing, hair, and walking styles. Stated generally, however, the patrolman tends to contact people who "look suspicious," and then, by using various techniques of interrogation, he tries to link the person he is interrogating to the universe of possible and reported crimes.
>
> . . . .
>
> . . . A variety of interrogation techniques are used, including false accusations and lies about the amount of information possessed. The success of these techniques is reflected by the fact that over 90 percent of juvenile convictions in the United States are gotten because the boys "confess."[115]

In order for a juvenile to effectively waive a constitutional right, it is imperative that he have a clear understanding of the police officer's role. Interrogations, as can be seen above, are intended to further a police investigation, and a juvenile should fully realize that answering questions posed by the police can be potentially detrimental to them. An officer's initial remarks may be loaded or indirect, such as, "What's going on here?" "Who started it?" "O.K., what else did you take?" An officer may not reveal that the juvenile is the prime suspect; indeed, the moment of arrest is often not made clear. An officer's voice may suggest a casual exchange and he may employ an apparently "routine" line of questioning until he can establish the youth's complicity in the crime under investigation. "The officer seeks to keep the suspect in a state of 'informational imbalance.' . . . [because] [j]uveniles are more inclined to 'cop-out' than an adult, and a good

interrogation will result often in the admission of other crimes and the identification of accomplices."[116]

Prior experience with the police and court system may mitigate the intellectual disabilities of an accused during a custodial interrogation. The San Diego study, however, as well as others, shows that a minor's knowledge that he has the right to remain silent is often subordinate to his mental state at the time of the arrest confrontation. Most minors feel predisposed to talk![117]

In conclusion, it would appear necessary to reevaluate the procedure by which confessions of juveniles are obtained, or, in the alternative, to set stricter requirements for their admissibility into evidence against a juvenile. The following are some suggestions:

- Procedural safeguards, including *Miranda* warnings, must be adhered to. The *Miranda* advisement ought properly to be viewed not as a rigid and sacrosanct legal artifact locked in concrete for all time, but rather as a flexible instrument of justice, capable of being modified as necessary so as to make clear to the individual interrogatee the constitutional protections designed for his safety.

- Stricter criteria should be established for a waiver to be held valid. A waiver of rights by a minor must show that he comprehended the meaning of such rights and the effect of the waiver. It isn't enough merely to indicate that the statements he makes may be used in evidence against him. A juvenile often doesn't know the importance of confessions in gaining convictions until he has provided the state with its best evidence against him.

- Questioning must only follow such a competent waiver of rights.

- The atmosphere of the interrogation must be clearly adversarial so that the juvenile will not be lulled into thinking the officers are his friends.

- It does not appear to be too great a burden to require police to obtain the child's parents or lawyer before accepting his waiver or questioning him.

- The confession or admission of the juvenile must have been voluntarily given, *e.g.*, induced by no physical or psychological coercion.

- Spontaneous statements from juveniles should not be unqualifiedly accepted and admitted into evidence.

"Convictions in the criminal court today based solely and exclusively to any measurable degree upon an admission by the defendant, are on shaky grounds at best. It this is true in adult courts, it is more so in juvenile court where the defendant is by definition a juvenile."[118]

FOOTNOTES

1. In *Kent v. United States*, the United States Supreme Court noted that the juvenile was receiving "the worst of both worlds: that he [got] neither the protections accorded to adults nor solicitous care and regenerative treatment postulated for children." 383 U.S. 541, 556 (1966).

2. Panneton, *Children, Commitment and Consent: A Constitutional Crisis*, 10 FAM. L.Q. 295, 298 (1977).

3. STROUSE, UP AGAINST THE LAW at xii (1970).

4. 384 U.S. 436 (1966). *Miranda* was a composite of four representative cases from various jurisdictions in the United States involving situations in which suspects must be afforded constitutional protections by law enforcement officers. Until recently, *Miranda* was thought to address both the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel. This combined-focus interpretation has not, however, been supported by subsequent Supreme Court rulings.

5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend V.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend VI.

6. *E.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964).

7. 384 U.S. at 478.

8. [The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so choses.

Id. at 479.

9. 387 U.S. 1 (1967). Gerald Gault, age fifteen, was brought before the juvenile court for allegedly making an obscene telephone call to a neighbor. Neither the minor nor his parents were told of the charge made against him, nor was the minor informed of his constitutional rights. He was adjudicated a delinquent, and the Arizona Supreme Court affirmed the decision on appeal. The United States Supreme Court reversed the judgment.

10. *Id.* at 55.

11. PAULSEN & WHITEBREAD, JUVENILE LAW & PROCEDURE 15 (1974).

12. 387 U.S. at 30-31 (emphasis added). Here the Court quoted from its earlier decision in Kent v. United States, 381 U.S. 541 (1966).

13. Popkin, Lippert & Keiter, *Another Look at the Role of Due Process in Juvenile Court*, FAM. L.Q. 237, *reprinted in* KATZ, THE YOUNGEST MINORITY 177 (1974).

14. 387 U.S. at 48.

15. Dorsen & Rezneck, *In re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 37 (1967).

16. 387 U.S. at 53, 55. For the purpose of this paper, the term "confession" includes statements and admissions made by a suspect during custodial interrogation.

17. 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967).

18. 67 Cal. 2d at 383, 432 P.2d at 215, 62 Cal. Rptr. at 599.

19. 67 Cal. 2d at 385, 432 P.2d at 216, 62 Cal. Rptr. at 600.

20. PAULSEN & WHITEBREAD, *supra* note 11 at 104.

21. 387 U.S. at 55.

22. "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States." Pierce v. Somerset Ry., 171 U.S. 641, 648 (1898). *See* 21 AM. JUR. 2d §§ 219, 316-17. *See also* State v. McClelland, 164 N.W.2d 189, 195 (1969); Mulaney v. State, 246 A.2d 291, 301 (1968); *Waiver of Rights Under Miranda*, 19 AM. JUR. PROOF OF FACTS, ANNOTATED §§ 1-50.

23. 304 U.S. 458 (1938).

24. > A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon *the particular facts and circumstances surrounding that case*, including the background, experience, and conduct of the accused.

Id. at 464 (emphasis added).

25. *Id.* The *Johnson v. Zerbst* standard was rearticulated in *Escobedo* and *Miranda*. *See* notes 4 & 6 *supra*. The Court in *Escobedo* recognized that "[t]he accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pre-trial stage or at the trial." 378 U.S. at 490 n.14.

26. 384 U.S. at 444.

27. Note, *Waiver of Constitutional Rights by Minors: A Question of Law or Fact?*, 19 HAST. L.J. 223 (1967).

28. *Juvenile Confessions: Whether State Procedures Ensure Constitutionally Permissible Confessions*, 67 J. CRIM. L. & C. 201 (1976).

29. *Id.*

30. *But see* State in Interest of S.H., 61 N.J. 108, 293 A.2d 181 (1972), which held that, as a matter of law, a child could not make a knowing and intelligent waiver of his constitutional rights. Here, however, the minor was only ten years old.

31. People v. Hardin, 207 Cal. App. 2d 336, 340-41, 24 Cal. Rptr. 563, 566 (1962).

32. 387 U.S. at 55.

33. *Id.*

34. 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967).

35. 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

36. 384 U.S. at 478 (citing *Dorado*, 62 Cal. 2d at 354, 398 P.2d at 371, 42 Cal. Rptr. at 179).

37. 41 CAL. S.B.J. 803 (1966).

38. CAL. WELF. & INS. CODE § 627.5.

39. CAL. WELF. & INS. CODE § 633.

40. CAL. WELF. & INS. CODE § 700.

41. 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

42. 70 Cal. 2d at 463, 450 P.2d at , 75 Cal. Rptr. at 13 (citing *Lara*). *See also* In re Francis W., 42 Cal. App. 3d 900, 903, 117 Cal. Rptr. ___, 277 (1974), which also stated that age alone was not conclusive on the issue of waiver.

43. 70 Cal. 2d at 466, 450 P.2d at 309, 75 Cal. Rptr. at 15.

44. 61 N.J. 108, 293 A.2d 181 (1972).

45. 61 N.J. at 115, 293 A.2d at 185.

46. 53 Cal. App. 3d 198, 125 Cal. Rptr. 625 (1975).

47. 53 Cal. App. 3d at 202-03, 125 Cal. Rptr. at ___.

48. 53 Cal. App. 3d at 204, 125 Cal. Rptr. at ___.

49. 55 Cal. App. 3d 986, 127 Cal. Rptr. 881 (1976).

50. 55 Cal. App. 3d at 995-97, 127 Cal. Rptr. at ___ (citations omitted).

51. 71 Cal. App. 3d 398, ___ Cal. Rptr. ___ (June 1977).

52. 71 Cal. App. 3d at 404, ___ Cal. Rptr. at ___ (citation omitted).

53. 71 Cal. App. 3d at 405, ___ Cal. Rptr. at ___.

54. 72 Cal. App. 3d 133, ___ Cal. Rptr. ___ (July 1977).

55. 72 Cal. App. 3d at 138, ___ Cal. Rptr. at ___.

56. 72 Cal. App. 3d at 136, ___ Cal. Rptr. at ___.

57. 625. Temporary custody and detention. A peace officer may, without a warrant, take into temporary custody a minor:
(a) Who is under the age of 18 years when such officer has reasonable cause for believing that such minor is a person described in Section 601 or 602, or
(b) Who is a ward of the juvenile court or concerning whom an order has been made under Section 636 or 702, when such officer has reasonable cause for believing that person has violated an order of the juvenile court or has escaped from any commitment ordered by the juvenile court, or
(c) Who is under the age of 18 years and who is found in any street or public place suffering from any sickness or injury which requires care, medical treatment, hospitalization, or other remedial care.
In any case where a minor is taken into temporary custody on the ground that there is reasonable cause for believing that such minor is a person described in Section 601 or 602, or that he has violated an order of the juvenile court or escaped from any commitment ordered by the juvenile court, the officer shall advise such minor that anything he says can be used against him and shall advise him of his constitutional rights, including his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel.

58. Davis, *Justice for the Juvenile: The Decision to Arrest and Due Process*, 1971 DUKE L.J. 927 (citing In re Daniel R., 274 Cal. App. 2d 749, 754, 79 Cal. Rptr. 247, 250 (1969)). *See also* In re Donnie H., 5 Cal. App. 3d 781, 85 Cal. Rptr. 359 (1970).

59. WELF. & INS. CODE §§ 601, 602, 625.

60. CODE CIV. PROC. § 372.

61. 72 Cal. App. 3d 180, ___ Cal. Rptr. ___ (July 1977).

62. 72 Cal. App. 3d at 182, ___ Cal. Rptr. at ___.

63. *Id.*

64. 72 Cal. App. 3d at 183, ___ Cal. Rptr. at ___.

65. *Id.*

66. *Id.*

67. In re Garth D., 55 Cal. App. 3d at 998, 127 Cal. Rptr. at ___ (quoting In re Gault, 387 U.S. at 55).

68. 72 Cal. App. 3d at 185, ___ Cal. Rptr. at ___.

69. "[T]he labeling of juvenile proceedings as 'civil' has allowed the courts to deprive juveniles of certain constitutional liberties guaranteed to adults in criminal proceedings." *Juvenile Confessions: Whether State Procedures Ensure Constitutionally Permissible Confessions*, 67 J. CRIM. L. & C. 198 (1976).

70. 370 U.S. 49 (1962).

71. *Id.* at 54-55 (citation omitted)(*quoted in* People v. Lara, 67 Cal. 2d at 383, 432 P.2d at 214-15, 62 Cal. Rptr. at 598-99).

72. Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1563 n.116 (1967).

73. Long, *Headaches of a Judge--A Challenge to the Bar*, 27 WASH. L. REV. 130, 135 (1952).

74. 370 U.S. at 54.

75. Driver, *Confessions & the Social Psychology of Coercion*, 82 HARV. L. REV. 60 (1968).

76. *Id.* at 59.

77. ELDEFONSO, LAW ENFORCEMENT & THE YOUTHFUL OFFENDER 2d at 231 (1973).

78. WEST, THE YOUNG OFFENDER 55-56, 58, 74 (1967).

79. MUSSEN, CONGER & KAGAN, BASIC & CONTEMPORARY ISSUES IN DEVELOPMENTAL PSYCHOLOGY 350 (1975).

80. HIRSCHI & SELVIN, DELINQUENCY RESEARCH: AN APPRAISAL OF ANALYTIC METHODS 103 (1967).

81. GINSBERG & OPPER, PIAGET'S THEORY OF INTELLECTUAL DEVELOPMENT 202-06 (1969).

82. CAREY, GOLDFARB & ROWE, THE HANDLING OF JUVENILES FROM OFFENSE TO DISPOSITION, v. 1 at 19 (1967).

83. Beck, *Recreation & Delinquency*, *in* TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 340-41 (1967).

84. Ralph, *Language Development in Socially Disadvantaged Children*, REV. OF EDUC. RESEARCH 32 (1965).

85. John, *The Intellectual Development of Slum Children: Some Preliminary Findings*, AM. J. OF ORTHOPSYCH. 33 (1963).

86. Bikson, *Do They Talk the Same Language? Lexical Interface and Ethnicity*, The Rand Corporation, P-5996 at 1, 13 (August 1977).

87. *Id.* at 16.

88. Note, *supra* note 27 at 225.

89. Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970).

90. 70 Cal. 2d at 464 n.13, 450 P.2d at 308 n.13, 75 Cal. Rptr. at 13 n.13.

91. San Diego Study, *supra* note 89 at 40.

92. *Id.* at 39.

93. The *Miranda* admonition was reduced to the following five elements:
(1) the right to SILENCE
(2) court USE of statements
(3) the right to an ATTORNEY
(4) the right to an ATTORNEY NOW during questioning
(5) the appointment or COST OF AN ATTORNEY
Id. at 43.

94. *Id.* at 40. The simplified warning, devised for the purpose of the study, was as follows:

> You don't have to talk to me at all, now or later on; it is up to you.
> If you decide to talk to me, I can go to court and repeat what you say, against you.
> If you want a lawyer, an attorney, to help you to decide what to do, you can have one free before and during questioning by me now or by anyone else later on.
> Do you want me to explain or repeat anything about what I have just told you?
> Remembering what I've just told you, do you want to talk to me?

95. *Id.* at 54.

96. When I administered a similar interview to a small number of non-delinquent upper middle class teenagers (Pacific Palisades) in December 1977, I, too, found that the young people had a great deal of difficulty understanding that they themselves could prevent the police from asking any questions until such a time as an attorney could be present.

97. Note, *supra* note 27 at 225 (footnote omitted).

98. San Diego Study, *supra* note 89 at 42.

99. Project, *supra* note 72 at 1576 (citing *Miranda*, 384 U.S. at 457).

100. *Id.* at 1577 (footnotes omitted).

101. Haynes v. Washington, 373 U.S. 503 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Spano v. New York, 360 U.S. 315 (1960).

102. 384 U.S. at 453-54.

103. 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971).

104. 6 Cal. 3d at 381, 491 P.2d at ___, 99 Cal. Rptr. at 4-5.

105. 6 Cal. 3d at 383-84, 491 P.2d at ___, 99 Cal. Rptr. at 6.

106. ELDEFONSO, *supra* note 77 at 224.

107. 332 U.S. 596 (1948).

108. *Id.* at 599-600.

109. 370 U.S. 49 (1962).

110. *Id.* at 54.

111. CAREY, GOLDFARB & ROWE, *supra* note 82 at 35.

112. San Diego Study, *supra* note 89 at 53.

113. Ageton & Elliott, *The Effects of Legal Processing on Delinquent Orientations*, 22 SOC. PROB. 94 (1974).

114. *Id.* at 95.

115. Werthman, *The Function of Social Definitions in the Development of Delinquent Careers*, *in* TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 166-67 (1967).

116. CICOUREL, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE 114, 116-17 (1968).

117. San Diego Study, *supra* note 89 at 51.

118. HAHN, THE JUVENILE OFFENDER AND THE LAW 292 (1971).